

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PAC-WEST TELECOMM, INC.
Petitioner,

v.

QWEST CORPORATION,
Respondent.

LEVEL 3 COMMUNICATIONS, LLC,
Petitioner,

v.

QWEST CORPORATION,
Respondent.

DOCKET NO. UT-053036

DOCKET NO. UT-053039

(consolidated)

QWEST'S RESPONSE BRIEF

I. Introduction

1 This matter is before the Commission on remand from the United States District Court for the Western District of Washington in *Qwest*.¹ In *Qwest*, the Court directed that the Commission classify "VNXX calls, for compensation purposes, as within or outside of a local calling area."²

The Court remanded the matter to the Commission because it found that it was a violation of

¹ *Qwest Corporation v. Washington State Utilities and Transportation Commission*, 484 F.Supp.2d 1160 (W.D. Wash. 2007) ("*Qwest*").

² *Id.* at 1177.

federal law to interpret the *ISP Remand Order*³ to require Qwest to pay reciprocal compensation to Pac-West or Level 3 for VNXX calls that terminated outside of the caller's local calling area. As the Court recognized, such an interpretation would reverse the compensation flow that applies to interexchange calls to ISPs counter to the very policy considerations that gave rise to the *ISP Remand Order*.⁴

2 As Qwest explained in its prior briefs, two intercarrier compensation regimes apply to calls to Internet Service Providers ("ISPs"). The applicability of these two regimes turns on the location of the ISP in relation to the calling party. For calls placed to ISPs located within the caller's local calling area, the *ISP Remand Order* compensation scheme applies. For calls placed to ISPs located outside of the caller's local calling area, the FCC's access charge regime applies. Under the FCC's access charge rules, an ISP is treated as an end user "*for the purpose of applying access charges.*"⁵ The FCC's access charge regime in which ISPs are treated as end users is preserved by Section 251(g) of the Act until such time as the FCC explicitly supersedes the applicable regulations, orders and policies under that regime.⁶

3 In its decision that led to this remand proceeding, the *Qwest* Court agreed that this analysis is correct. Quoting the First Circuit's decision in *Global Naps I* and the *ISP Remand Order*, the *Qwest* court stated that "Congress, in passing the [Act], did not intend to disrupt the pre-[Act] access charge regime, under which LECs provided access services...in order to connect calls that travel to points—both interstate and intrastate—beyond the local exchange."⁷ Earlier this year, after considering the FCC's 2008 *ISP Mandamus Order*⁸ and the D.C. Circuit's *Core*

³ Order on Remand, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-bound Traffic*, 16 FCC Rcd 9151 (Rel. April 27, 2001) ("*ISP Remand Order*").

⁴ *Qwest*, 484 F.Supp.2d at 1175.

⁵ *ISP Remand Order*, ¶ 11 (emphasis added).

⁶ 47 U.S.C. §251(g); *Competitive Telecommunications Association v. FCC*, 117 F.3d 1068, 1072-1073 (8th Cir. 1997).

⁷ *Qwest*, 484 F.Supp.2d at 1170.

⁸ Order on Remand, *In the Matter of High-Cost Universal Service Support*, 24 FCC Rcd 6475 (Rel. November 5, 2008). Level 3 refers to this order throughout its brief as the "*2008 Order*." Qwest referred to this order as the "*ISP Mandamus*

decision,⁹ the First Circuit in *Global Naps V*¹⁰ concluded that, while the FCC has jurisdiction over calls to ISPs located outside of the caller's local calling area such as VNXX calls, the FCC has not yet exercised its jurisdiction to change the pre-Act rules applicable to such calls. Accordingly, the pre-Act rules continue to apply.

4 In their supplemental briefs, Pac-West and Level 3 attempt to argue that the D.C. Circuit's decision in *Core* somehow changed the landscape in this remand proceeding when it affirmed the FCC's *ISP Mandamus Order* (or "2008 Order" as Level 3 refers to it). Pac-West and Level 3 are simply wrong. *The ISP Mandamus Order* and *Core* address only calls placed to ISPs located within the caller's local calling area. As Qwest pointed out in its initial supplemental brief, that is clear from the arguments made in *Core* to challenge the *ISP Mandamus Order*, from the FCC's briefs to the D.C. Circuit and from the First Circuit's decision in *Global Naps V*. *The ISP Mandamus Order* and *Core* do not address VNXX traffic.

5 Pac-West and Level 3 take different approaches in their arguments and, accordingly, Qwest responds to their arguments separately.

II. Response to Pac-West

6 In its brief, Pac-West acknowledges, as it must, that under the *ISP Mandamus Order* and the *ISP Remand Order*, Section 251(b)(5) does not apply to telecommunications traffic that is governed by FCC rules, orders, and policies preserved by Section 251(g) of the Act.¹¹ In the *ISP Mandamus Order*, the FCC stated: "we agree with the finding in the *ISP Remand Order* that traffic encompassed by section 251(g) is excluded from Section 251(b)(5) except to the

Order" in its initial brief and will use that term in this brief.

⁹ *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Circuit 2010).

¹⁰ *Global Naps, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 83, (1st Cir. 2010) ("*Global Naps V*").

¹¹ Pac-West Initial Supplemental Brief, ¶ 3.

extent that the Commission acts to bring that traffic within its scope.”¹²

7 To get around the Section 251(g) carve out, Pac-West makes several arguments. First, Pac-West argues that because the location of the ISP is of “no significance” for purposes of the FCC’s jurisdictional analysis upheld in *Core*, the location of the ISP is also irrelevant for purposes of Section 251(b)(5) of the Act.¹³ On this point, Pac-West erroneously confuses the FCC’s jurisdictional analysis in the *ISP Mandamus Order* with FCC’s analysis of Section 251(b)(5). For jurisdictional purposes, the FCC treated a call to an ISP on an end-to-end basis from the caller to websites on the Internet and concluded that it was interstate traffic such that the FCC had authority to regulate rates for ISP-bound traffic under Section 201 of the Act. However, the FCC did not analyze ISP traffic on an end-to-end basis to determine whether it came within Section 251(b)(5) of the Act. Rather, the FCC concluded that Section 251(b)(5) did not apply to traffic governed by rules preserved by Section 251(g) of the Act until such time as the FCC determined to bring such traffic within the scope of Section 251(b)(5).¹⁴

8 Second, Pac-West erroneously argues that there were no pre-Act rules applicable to calls destined for an ISP that could be preserved by Section 251(g) of the Act. Pac-West is completely wrong. Under the FCC’s pre-Act rules, an ISP was treated as an end user for purposes of applying access charges and was treated just like any other end user.¹⁵ The FCC’s pre-Act rules did not apply access charges based on the type of end user who was called. Rather, the Pre-Act rules established that all interexchange traffic over the public switched network is subject to access charges when the caller and the called party are in different local calling areas.¹⁶ Pac-West’s argument is akin to asserting that there were no specific pre-Act

¹² *ISP Mandamus Order*, ¶ 16.

¹³ Pac-West Initial Supplemental Brief, ¶¶ 4-5.

¹⁴ *ISP Mandamus Order*, ¶ 9.

¹⁵ *ISP Remand Order*, ¶ 11; *ACS of Anchorage, Inc.*, 290 F.3d 403, 409 (DC Cir. 2002 (“Rather than directly exempting ESPs from interstate access charges, the [FCC] defined them as “end users”—no different from a local pizzeria or barber shop.”)).

¹⁶ 47 C.F.R. § 69.5(b)(carrier’s carrier charges apply to all “interexchange carriers”); CLECs who offer interexchange

rules applicable to calls destined for Pizzerias or any other specifically named business.

9 Furthermore, as Qwest explained in its response to Pac-West's pending motion for summary judgment, pre-Act rules provided that access charges applied at the open-end of interstate FX and equivalent services.¹⁷ The Commission has already ruled that FX and VNXX are functionally equivalent.¹⁸

10 Pac-West bases its argument entirely on the FCC's statement in the *ISP Mandamus Order* that the D.C. Circuit had found in *WorldCom* that "there had been no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic."¹⁹ However, the traffic the *WorldCom* court was addressing included only calls placed to an ISP located within the caller's local calling area.²⁰ The *WorldCom* Court's statement that there were no pre-Act rules applicable to calls made to ISPs located within the caller's local calling area was only true because there were no pre-Act intercarrier compensation rules applicable to any local calls involving two end users communicating within the same local calling area. VNXX calls, which by definition are made to ISPs located outside the caller's local calling area, were completely outside the scope of *WorldCom*, as the FCC itself has acknowledged.²¹

11 Third, Pac-West again relies upon *WorldCom* and argues that Section 251(g) does not apply because LEC services to other LECs are not to either an IXC or an ISP. Pac-West is wrong on

service qualify as interexchange carriers for purposes of this rule. *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, ¶ 19, n. 80 ("Depending on the nature of the traffic,...competitive LECs may qualify as interexchange carriers for purposes of [47 C.F.R. §69.5(b)].")

¹⁷ Memorandum Opinion and Order, *In the Matter of Bell Atlantic Petition for Declaratory Ruling concerning Application of the Commission's Access Charge Rules to Private Telecommunications Systems*, 2 FCC Rcd 7458, ¶¶5, 12 (1987)(FCC's access charge rules subject open end of FX lines "and their equivalents" to access charges).

¹⁸ *Qwest Corporation v. Level 3 Communications LLC, et al.*, Docket No. UT-063038, Order No. 10, ¶333 (July 16, 2008)("VNXX Final Order").

¹⁹ *ISP Mandamus Order*, ¶16.

²⁰ *WorldCom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002).

²¹ June, 2009 letter from Lisa Anderl to Mr. David Danner submitting supplemental authority, Tab 1, Opposition of Federal Communications Commission to Petition for Writ of Mandamus, *In re Core Communications, Inc.*, p. 26, n. 22.

this point as well. Pac-West is an interexchange carrier when it engages in VNXX telephone service, which, by definition, entails the interexchange carriage of telephone calls. Pac-West creates a toll-free interexchange service that allows dial-up customers to place calls to ISPs in a different local calling area. Qwest provides originating access to Pac-West, the IXC, in this circumstance.²² Thus, Qwest's right to compensation is preserved by Section 251(g).

12 Again, Pac-West's reliance upon *WorldCom* is misplaced because *WorldCom* was addressing only calls placed to an ISP located within the caller's local calling area, a situation that involves a service provided by a LEC to another LEC. Interexchange calls involving a caller in one local calling area and an ISP in a different local calling area were not even at issue in *WorldCom*.

13 Fourth, Pac-West argues that Section 251(g) only applies to the specific services that were actually being provided at the time of the Act and that VNXX service did not exist prior to the Act. This argument is wrong. Section 251(g) does not list any services by name. Rather, section 251(g) preserves the access charge regime, including receipt of compensation under all FCC orders, regulations and policies in place at the time of the Act. There is nothing in the language of Section 251(g) that refers to specific enumerated services. Under the pre-Act rules, access charges applied to all interexchange calls—it was that regime that was preserved by Section 251(g). A carrier cannot avoid the access charge regime preserved by Section 251(g) simply by giving an interexchange service a new name.

14 Fifth, Pac-West argues that it is not an IXC. In making this argument, Pac-West does not dispute that it is offering an interexchange service when it engages in VNXX. Rather, Pac-West argues that its VNXX service is like Qwest's MEL (market expansion line) service and

²² This is not an "either – or" question. An IXC is a carrier that provides an interexchange service. A LEC provides local exchange and exchange access services. A single carrier can, and often does, provide both functions on a single call. If Pac-West is a LEC for VNXX traffic, it would be doubling as a LEC and an IXC and Qwest and Pac-West would be jointly providing switched access service to Pac-West, the IXC. Pre-Act rules applied in such a situation and provided that both Qwest and Pac-West would then charge Pac-West, the IXC, originating access. See Qwest Corporation's Response to Pac-West Motion for Summary Determination, ¶¶13-21.

that MEL service is not treated as an interexchange service. However, this analogy to MEL supports precisely the opposite conclusion. MEL is nothing more than remote call forwarding. For example, a business in Seattle that wishes to have a telephone number associated with Tacoma, can subscribe to a Tacoma market expansion line. The customer purchases local service in Tacoma (and pays the tariffed rates for the service). The customer can then forward calls made to that number to wherever it wishes the phone to be answered. If the MEL customer wants to forward the call to a different local calling area, the *MEL subscriber pays toll rates to its IXC*, which in turn pays both originating and terminating access charges. Contrary to Pac-West's suggestion, at least one and possibly two interexchange carriers are involved in a MEL service that is forwarded out of the local calling area, and switched access charges are assessed and paid. Thus, Pac-West's attempt to analogize VNXX service to MEL service actually supports Qwest's position that Pac-West is an interexchange carrier when it engages in VNXX.

15 Finally, Pac-West argues that Qwest has not rebutted the three to one (3:1) presumption set forth in the *ISP Remand Order*. However, contrary to Pac-West's assertions, Qwest has rebutted the 3:1 presumption by demonstrating that none of Pac-West's traffic is delivered to an ISP modem within the state of Washington.²³ Accordingly, all of Pac-West's traffic is VNXX traffic, not "ISP-bound traffic" within the meaning of the *ISP Remand Order*. As discussed above, Qwest does not owe Pac-West reciprocal compensation on VNXX traffic. Rather, the access charge regime applies and under that regime, if compensation is due, it is due from Pac-West to Qwest. In all events, Qwest is entitled to a refund of the payments previously made to Pac-West prior to the Washington Federal Court's remand now that the Commission has determined that VNXX traffic does not involve calls delivered to an ISP located in the caller's local calling area.²⁴

²³ Affidavit of Philip A. Linse in Support of Qwest Corporation's Motion for Summary Determination, ¶¶5-10.

²⁴ *VNXX Final Order*, ¶332.

III. Response to Level 3

16 Much of Level 3's argument is based on the assumption that the Commission will accept as meaningful a new term created by Level 3, in an effort to cast a completely new light on the governing authorities. According to Level 3, *Core* confirms that reciprocal compensation is due for all *locally-dialed* calls terminated by a LEC.²⁵ Level 3 uses the term "locally-dialed" thirty-two times in its brief and strongly implies that the term "locally dialed" actually appears in the *ISP Mandamus Order* and the *Core* decision. However, the term "locally-dialed" is not used once in *Core*, the *ISP Mandamus Order* or any of the decisions preceding them. The phrase "locally-dialed" is simply an invention by Level 3 to disguise the true interexchange nature of VNXX traffic. Through the use of this term, Level 3 is trying to create the impression that VNXX calls are local calls even though they are not. VNXX calls originate in one local calling area and terminate in another local calling area.²⁶ Level 3 uses this term because the *Qwest* court's remand instruction to the Commission was to classify VNXX calls for compensation purposes "as within or outside a local calling area."²⁷ Level 3's "locally-dialed" term does not advance its cause. Rather, it highlights the lengths Level 3 goes to stretch the *ISP Mandamus Order* and *Core* to fit Level 3's erroneous argument.

17 Under federal law, state commissions define local calling areas for purposes of both interstate and intrastate traffic.²⁸ In Washington, local calls are calls that originate and terminate within the same geographic local calling area.²⁹ In this case, Level 3 argues that calls are determined to be local based solely on a comparison of the originating or terminating telephone numbers. However, the authorities Level 3 relies upon all involve determinations concerning the state

²⁵ Level 3's Initial Brief to Refresh the Record, ¶1.

²⁶ *VNXX Final Order*, ¶¶303, 309 and 332.

²⁷ *Qwest*, 484 F.Supp.2d at 1177.

²⁸ First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 1035 (Rel. Aug. 8, 1996) ("Local Competition Order");

²⁹ Order 10, *Qwest Corporation v. Level 3 Communications, LLC, et al*, Docket UT-063038, ¶304 (July 16, 2008).

law in other states. For example, in the FCC's *Starpower* decision, the FCC applied Virginia law and used a comparison of originating and terminating telephone numbers to determine the amount of reciprocal compensation due because the Verizon South interconnection agreement at issue linked reciprocal compensation to a specific Verizon South tariff. While it is permissible to classify calls as local based solely on a comparison of originating and terminating telephone numbers for some purposes, it is not permissible as a ruse to pretend that interexchange traffic is local. In any event, how calls are classified has always been a matter up to each state commission based on the rules in place in the particular state. The Washington Commission has not adopted Level 3's approach.

18 After injecting the "locally-dialed" term into the discussion, Level 3 claims that terminating intercarrier compensation is due on these calls ostensibly because *Core* upheld the FCC's end-to-end jurisdictional analysis and stated that for jurisdictional purposes the location of the ISP has no significance. In making this argument, Level 3 confuses the analysis (discussed above in Qwest's response to Pac-West) that must be undertaken to determine whether the FCC has jurisdiction and the analysis that must be performed to determine whether Section 251(b)(5) reciprocal compensation applies. For jurisdictional purposes, calls to an ISP are analyzed on an end-to-end basis, from the caller to Internet websites throughout the world. The FCC reached that conclusion in each of its orders concerning ISP-bound traffic, culminating in the *ISP Mandamus Order*.³⁰ For jurisdictional purposes, the location of the ISP has no significance because jurisdiction is determined by the endpoints of the call, not intermediate stopping points along the way. However, for determining applicability of access charges, the ISP point of presence is used as one of the end points. In other words, the ISP is treated as an end user.

19 Level 3's argument really boils down to an assertion that because the FCC has jurisdiction to regulate all ISP traffic, it must have done so in the *ISP Mandamus Order*. That is simply not

³⁰ *ISP Mandamus Order*. ¶¶ 2-4, 17 and 21.

the case. In *Global Naps V*, the First Circuit rejected Level 3's argument by observing that "a matter may be subject to FCC jurisdiction, without the FCC having exercised that jurisdiction and preempted state regulation."³¹ After carefully evaluating the history and context of the *ISP Mandamus Order*, the First Circuit concluded that the *ISP Mandamus Order* only addressed calls "to an ISP within a local calling area." Its purpose was to justify, not change, the rate system adopted in the *ISP Remand Order*. As the Court noted, that system applied only to local ISP traffic (*i.e.*, calls that originate and terminate within the same local calling area).

20 Level 3 really has no basis for disputing that the *ISP Remand Order* and the *ISP Mandamus Order* prescribe an intercarrier compensation scheme limited to calls placed to an ISP in the caller's local calling area. The best Level 3 can do is to assert that the FCC was merely referring to these types of calls as a typical arrangement without limiting the scope of the proceedings it had started. However, such an assertion conflicts completely with the history of the proceedings. When the proceedings leading up to the *ISP Mandamus Order* started, the only calls that could have possibly been subject to reciprocal compensation were calls placed to an ISP located in the caller's local calling area. Under the FCC's *Local Competition Order*, only calls that originated and terminated in the same local calling area were subject to reciprocal compensation.³² Accordingly, when the FCC issued the *ISP Remand Order*, it stated the issue to be "whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end user customer to an ISP in the same local calling area that is served by a competing LEC."³³

21 Level 3's argument assumes that the FCC made a major change in its rules relating to access charges without mentioning them at all. The argument fails because the FCC could not have silently expanded the calls it was addressing to include calls to ISPs located outside the caller's

³¹ *Global Naps V*, 603 F.3d at 83.

³² *Local Competition Order*, ¶ 1034.

³³ *ISP Remand Order*, ¶ 13.

local calling area without explaining that it was doing so.³⁴ The *ISP Mandamus Order* does not state that it is enlarging the scope of calls covered by the *ISP Remand Order*'s intercarrier compensation scheme. The part of the *ISP Mandamus Order* that articulates the legal basis for this scheme is described merely as an Order on Remand.³⁵ Had the FCC intended to broaden the scope of traffic addressed by its order, it would have had to do so in accordance with the requirements of the Administrative Procedure Act that require a reasoned explanation of any such change. In the *ISP Mandamus Order*, the FCC did not expand the scope of the traffic covered by the *ISP Remand Order*.

22 *Global Naps V* is the only appellate court decision addressing the scope of the *ISP Mandamus Order* and it squarely holds that the *ISP Mandamus Order* is limited to calls placed to ISPs located in the caller's local calling area.³⁶ Level 3 attempts to overcome the First Circuit's decision in *Global Naps V* by arguing incorrectly that it is in conflict with the D.C. Circuit's decision in *Core* and that *Core* is the controlling decision under the Hobbs Act. In fact, *Core* and *Global Naps V* are in harmony and both support Qwest's position. *Core* upholds the FCC's jurisdictional analysis in the *ISP Mandamus Order* by affirming that calls to an ISP located *within* the caller's local calling area are jurisdictionally interstate and that the FCC has authority to regulate intercarrier compensation for such calls under Section 201 of the Act. While one can infer from those conclusions that the FCC *could, if it chose to*, regulate intercarrier compensation for calls to ISPs located *outside* the caller's local calling area such as VNXX calls, the FCC did not do so in the *ISP Mandamus Order*. Indeed, as the First Circuit pointed out in *Global Naps V*, the FCC told the D.C. Circuit in *Core*, that the rate system at issue applies "when two [carriers] collaborate to deliver calls to an ISP within a local calling area."³⁷ Furthermore, in *Core*, the FCC opposed the state petitioner arguments that reciprocal

³⁴ *Qwest*, 484 F.Supp.2d 1176.

³⁵ *ISP Mandamus Order*, ¶ 1.

³⁶ *Global Naps V*, 603 F.3d at 82-3.

³⁷ *Id.*

compensation applies only to local calls by arguing that non-local calls were not at issue in the appeal.³⁸

23 In short, Level 3's reliance on the FCC's jurisdictional analysis in *Core* is completely misplaced. In *Core*, the D.C. Circuit agreed that the end-to-end analysis was proper for jurisdictional purposes and upheld the FCC's authority to regulate rates for ISP-bound traffic. However, the D.C. Circuit did not hold that the *ISP Mandamus Order* purported to regulate rates for VNXX calls or any other calls to ISPs located outside of the caller's local calling area. Moreover, the Court did not hold that the end-to-end analysis determined the applicability of reciprocal compensation. Indeed, in *Bell Atlantic*, the D.C. Circuit had previously rejected the FCC's attempt to apply the end-to-end jurisdictional analysis in determining whether particular calls were subject to reciprocal compensation under the then existing rules.³⁹

24 The *ISP Mandamus Order* reaffirms the holding in the *ISP Remand Order* that reciprocal compensation does not apply to traffic governed by Section 251(g) until such time as the FCC "explicitly supersedes" the pre-Act regulations, orders and policies applicable to such traffic. Thus, for purposes of determining the applicability of reciprocal compensation, an end-to-end analysis does not apply. While the location of the ISP is not significant for purposes of determining whether the FCC has jurisdiction, it is critical for purposes of determining the intercarrier compensation scheme that applies to particular traffic. Under the FCC's pre-Act rules, an ISP is treated as an end user for purposes of applying access charges.⁴⁰

25 Level 3 argues that in the *ISP Mandamus Order* the FCC discarded its prior reliance on Section 251(g) and concluded instead that ISP-bound traffic fell within the scope of Section 251(b)(5).

³⁸ June , 2009 letter from Lisa Anderl to Mr. David Danner submitting supplemental authority, Tab 2, May 1, 2009 Brief for Federal Communications Commission, *Core Communications, Inc. v. FCC*, p. 43, n. 22.

³⁹ *Bell Atlantic v. FCC*, 206 F.3d 1, 5-7 (D.C. Cir. 2000).

⁴⁰ *ISP Remand Order*, ¶ 11; Notice of Proposed Rulemaking, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 4 FCC Rcd 3983, ¶ 42, n. 92 (Rel., May 9, 1989) (" [O]ur present rules do not distinguish between ESPs and end users.")

This argument is true only for calls to an ISP located within the caller's local calling area – that is, it is true only for the calls at issue in that case. If the ISP is within the caller's local calling area, the call is considered to be “ISP-bound traffic” and the *ISP Remand Order* compensation scheme applies. If the call is to an ISP located outside of the caller's local calling area, the FCC's access charge rules apply, and the ISP is treated as an end user for purposes of applying access charges. The rule that an ISP is treated as an end user for purposes of applying access charges was adopted in 1983 and was in place at the time the Telecommunications Act of 1996 became law. It is among the FCC rules preserved by Section 251(g).

26 Level 3 acknowledges in its discussion of *Core* that *Core* only addresses calls placed to ISPs located in the caller's local calling area. For example, in paragraph 10 of its brief, Level 3 states that *Core* found that ISP-bound traffic is unique “because it involves interstate communications that are delivered through local calls.”⁴¹ Then, in paragraph 11, Level 3 states that the D.C. Circuit rejected an argument that the FCC lacked jurisdiction to determine compensation because LECs terminate calls to ISPs “locally.”⁴² These are concessions that calls delivered to ISPs outside the caller's local calling area were simply not at issue in *Core*.

27 In its brief, Level 3 also observes that *Core* did not discuss Section 251(g) in its legal analysis. Section 251(g) is not discussed in *Core* because the only calls that were at issue were local calls to which the access charge regime preserved by Section 251(g) did not apply. Thus, *Core*'s failure to discuss Section 251(g) confirms Qwest's position that the only calls at issue were those to ISPs in the caller's local calling area.

28 Level 3 asks that the Commission ignore the *Qwest* court's remand instructions ostensibly because the court only reviewed the Commission's prior orders for consistency with the *ISP Remand Order* and did not consider the FCC's *ISP Mandamus Order*. According to Level 3,

⁴¹ *Level 3's Initial Brief to Refresh Record*, ¶ 10.

⁴² *Id.*, at ¶ 11.

the *ISP Mandamus Order* eliminated the distinction between reciprocal compensation and access charges because it described ISP-bound traffic as both “interstate” and “interexchange” in nature and because it supposedly held that the ISP-bound compensation scheme is “no longer tied to whether this traffic is local or long distance.” Level 3’s statements are not correct. The FCC reaffirmed the distinction between reciprocal compensation and access charges in the *ISP Mandamus Order* when it reiterated that traffic encompassed by Section 251(g) is not subject to reciprocal compensation until the FCC explicitly supersedes the pre-Act regulations, orders and policies applicable to such traffic. Furthermore, the FCC never said that the ISP-bound compensation scheme is no longer tied to whether this traffic is local or long distance. The FCC said that Section 251(b)(5) standing alone (that is, ignoring the Section 251(g) carve out) is not tied to whether particular traffic is local or long distance.

29 Level 3 erroneously asserts that Qwest’s position in this proceeding creates a donut hole in intercarrier compensation for ISP traffic. According to Level 3, “[l]ocally-dialed calls terminated to an ISP physically located in the same calling area or in another state would be subject to an interstate compensation regime” while “locally-dialed calls terminated to an ISP at a location *in between* would be subject to an intrastate compensation mechanism.”⁴³ Level 3’s argument is wrong for two reasons. First, Level 3’s alleged hole in the FCC’s rules does not exist. The full universe of ISP traffic is covered by two sets of FCC rules. Calls to ISPs located within the caller’s local calling area are subject to the *ISP Remand Order’s* compensation scheme. Calls to ISPs located outside the caller’s local calling area are subject to the FCC’s access charge regime preserved by Section 251(g) of the Act. Second, neither of these two sets of rules is defined by reference to Level 3’s invented term “locally-dialed”.

IV. Conclusion

30 The Commission should grant Qwest’s motions for summary determination, deny the motions

⁴³ *Level 3 Initial Brief to Refresh Record*, ¶15.

of Level 3 and Pac-West, and order refunds to Qwest of amounts previously paid, with interest.

DATED this 10th day of August, 2010

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